COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

June 13, 2008

In the Matter of	DEP Docket No. 2008-054
Somerset Power LLC	

Recommended Final Decision

Somerset Power LLC ("Somerset") proposed a conversion from the use of pulverized coal to plasma gasification technology as a fuel source at its Somerset Station electrical power generating facility in Somerset, Massachusetts. The Department of Environmental Protection (the "Department") approved a Second Non-Major Comprehensive Plan Application under 310 CMR 7.02 and an Amended Emission Control Plan under 310 CMR 7.29, approvals needed by Somerset under the state Clean Air Act and regulations. M.G.L. c. 111, ss. 142 A-J; 310 CMR 7.00. The Conservation Law Foundation ("CLF") and twelve citizens (collectively, the "Petitioners") filed a notice of claim, asserting that CLF is substantially and specifically affected and also seeking to intervene pursuant to M.G.L. c. 30A, s. 10A. The Petitioners claim that these approvals will result in higher emissions, particularly as to carbon dioxide, than allowed by a "shutdown or repower" condition in the original approval and seek to vacate the Amended Plan and second Non-Major Comprehensive Plan Application.

The Department and Somerset have filed joint motions to dismiss for lack of standing and for failure to state a claim. The Petitioners filed an opposition, which was

followed by reply briefs and a sur-reply. Somerset also filed a Motion for Extension of the January 1, 2010 Date for Converting Somerset Station, an extension opposed by the Petitioners but not opposed by the Department if limited to the administrative appeal period. After carefully considering the arguments on all motions, I have prepared this Recommended Final Decision for the consideration of the Department's Commissioner.

I conclude that the Petitioners have not stated a claim on which relief can be granted. 310 CMR 1.01(11)(d)2; see 310 CMR 1.01(5)(a)15.f.v. The Department, as a matter of law, was not required to retain the "shutdown or repower" condition. Further, the provision of the regulations governing carbon dioxide emissions from power plants were revised on the same day the Amended Plan was approved, January 25, 2008. The Department and the Commonwealth have embarked on a program to address global warming in coordination with other states that relies on a market-based "cap-and-trade" approach for carbon dioxide emissions, a more comprehensive strategy than the more traditional facility-specific permit limitations and conditions originally envisioned in 2001. Facilities such as Somerset must submit applications to conform to this new program by August 1, 2008. The Department clearly had the authority, as a matter of law and policy, to approve the conversion to syngas and the facility must also meet the requirements of this new program. I also conclude, as an alternate ground, that the Petitioners do not have standing to bring this appeal. Finally, the deadline for conversion may be extended, but only to reflect the conclusion of the administrative proceedings.

Background

In 2001, the Department promulgated regulations setting more stringent emissions limitations for specific pollutants at six power plants in the Commonwealth. 310 CMR

7.29. The plants were required to comply with their carbon dioxide emission limits directly out-of-stack, or use Greenhouse Gas Credits that can be created for projects that reduce, avoid, or sequester emissions of greenhouse gases. 310 CMR 7.00:Appendix B(7). The facilities, including Somerset Station, were required to submit emission control plans describing how they would comply with the regulations. Somerset's original Emission Control Plan was approved in 2002, followed by the approval of its first Non-Major Comprehensive Plan Application under 310 CMR 7.02 in 2003. A Final Operating Permit was issued in 2004.

A condition in the first Comprehensive Plan and the Operating Permit provided that Somerset must repower Unit 6/Boiler 8 or terminate its use by January 1, 2010:

> Somerset Power, LLC shall repower Unit 6, in accordance with the provisions of its approved Emissions Control Plan, by January 1, 2010, or terminate any operation of Unit 6 after January 1, 2010 should Somerset Power, LLC fail to repower Unit 6 by January 1, 2010.

Conditional Approval, Section VIII, Special Conditions, para. 7, 17 (February 24, 2003) (the "shutdown or repower" condition, CLF's term). "Repower" means to replace an emission unit with a new unit that is less polluting and more efficient than the replaced unit. 310 CMR 7.00(1). Id. The change from pulverized coal to plasma gasification technology is apparently not a repowering.

Somerset proposed modifications in 2006 to its fuel source, specifically to use "syngas" produced by plasma gasification of coal and biomass feedback instead of pulverized coal.[1] In addition to submitting a second Non-Major Comprehensive Plan

[1] A description of plasma gasification is provided in the Department's January 25, 2008 conditional approval of the Non-Major Comprehensive Plan Application granted to Somerset, attached to the Joint Motion to Dismiss for Failure to State a Claim and to the Notice of Claim, at 12-13. To paraphrase a summary from the motion, the technology uses plasma torches to create an extremely high temperature "plasma" zone where coal and biomass are broken down to produce synthetic gas which is then used to fire

Application, Somerset sought to amend its Emission Control Plan under 310 CMR 7.29. The Department followed its procedures for notice and public hearing, and issued its approvals of the second Non-Major Comprehensive Plan Application and Amended Emission Control Plan on January 25, 2008.[2] The emissions limits in the 2002 original Emission Control Plan were the same as the requirements in the regulations at 310 CMR 7.29. The emissions limits in the 2008 Amended Plan show substantial reductions, ranging from 51% for nitrogen oxides to 86 % for sulfur dioxide, while carbon dioxide shows a lesser reduction of 6.1%.

A Special Condition states that "Unit 6/Boiler 8 shall cease burning pulverized coal and shutdown for the conversion to syngas on or before January 1, 2010." Conditional Approval of Non-Major Comprehensive Plan Application, Section VIII, para. 10, January 25, 2008. The prior approval, including the shutdown provisions, remains in effect if the conversion to syngas does not go forward. Conditional Approval letter from John K. Winkler to Leonard J. Ariagno, January 25, 2008. The Department's approval of the Amended Emission Control Plan states that a person aggrieved may request an adjudicatory hearing.

CLF filed a notice of claim for an adjudicatory hearing on behalf of itself and twelve citizens of the Commonwealth on February 15, 2008. The claim appended affidavits from the citizens, who live in Fall River, Somerset, or Westport. The citizens state that the emissions allowed in the Amended Plan will increase health risks and contribute to a loss of Massachusetts coastline as a result of global warming. CLF alleges

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the boiler. This is the first known commercial application of direct coal plasma gasification. See Motion to Dismiss for Failure to State a Claim at 5.

[2] These had been reissued with clarifications added to documents first issued on January 23, 2008.

that its members and the twelve citizens had been involved in the permitting process and are substantially and specifically affected; in the alternative the Petitioners state that they may intervene and appeal under the provisions of M.G.L. c. 30A, s. 10A.

The grounds for the appeal are that the Amended Emission Control Plan does not comply with the Department's statutory and regulatory obligation because the "shutdown or repower" clause from the earlier approval would have yielded more protective results, particularly for carbon dioxide emissions on the basis of this original condition. The Petitioners acknowledge that the Department and the Commonwealth have taken a leadership role in recognizing the consequences of climate change and addressing carbon dioxide emissions. See Notice of Claim. Massachusetts was the first state in the nation to regulate greenhouse gases and the lead plaintiff in the Supreme Court case to prompt federal action on global warming. See Massachusetts v. EPA, 549 U.S. __, 127 S. Ct. 1438 (2007). Massachusetts Governor Deval Patrick signed the Regional Greenhouse Gas Initiative on January 18, 2007, committing the Commonwealth to participate in a "cap-and-trade" program consistent with similar efforts in other northeast states. Nonetheless, the Petitioners seek an evidentiary hearing where they may establish that the Amended Emission Control Plan is not more protective than the original plan, and therefore should be vacated.

Failure to State a Claim

The Petitioners' claim is centered on the theory that the Department's approval of the Amended Plan allowed Somerset unlawfully to "escape" the 2003 requirement that it repower by 2010 or terminate its operation of Unit 6, the "shutdown or repower" condition of the original Emission Control Plan. The Petitioners allege that Somerset is

one of the oldest, dirtiest power plants in the state and it has been allowed to "backslide" on its requirements to reduce air emissions, including greenhouse gas emissions. The Petitioners' allegation is that the reductions required in the Amended Emission Control Plan are not as large as if the facility were to undergo a repowering or were shut down, i.e., the amendment is less environmentally protective and therefore, legally impermissible. Specifically, the Petitioners seek to offer evidence during an administrative hearing demonstrating an alternative – repowering with natural gas – would be as protective as the original Emission Control Plan. For purposes of a motion to dismiss, I take the factual allegations of the petitioners as true. 310 CMR 1.01(11)(d)2. The Petitioner's request as relief that the Amended Emission Control Plan and the Second Non-Major Comprehensive Plan Application be vacated.

I first address the Petitioner's claim that the legal standard for accepting an amended emissions control plan is that the original plan is no longer feasible and that the amendment is more environmentally protective than the original plan. Neither the regulations nor Department policy establish this standard. See Matter of Town of Hamilton, Topsfield, and Wenham, Docket Nos. 2003-065, 2003-079 and 2003-068, Recommended Final Decision (January 19, 2006) (where claim of violation of obligation under regulations, party entitled to prevail upon showing of lack of compliance with *regulatory standard* (emphasis added)), adopted by Final Decision (March 27, 2006). The governing regulations allow amendments, without qualification. 310 CMR 7.29(6)(h) ("Any person subject to 310 CMR 7.29 may propose amendments to the approved emission control plan."). Amendments are subject to public notice pursuant to M.G.L. c. 30A. Id. The original Emission Control Plan allows Somerset to seek amendments. See

Emission Control Plan Final Approval, Section 6, 2002 ("Amendments may be proposed to this approved Emission Control Plan."). The regulatory revisions to 310 CMR 7.29 on January 25, 2008 launch a new program for carbon dioxide emissions.

Although the Petitioners urge that I find and apply their standard for amendments, there is simply no explicit requirement that the result be more environmentally protective, assuming that the Petitioners' assertion is factually correct. Some environmental programs include explicit "anti-backsliding" provisions. For example, the Clean Water Act states that a permit may not be renewed, reissued or modified to contain effluent limitations less stringent than the previous permit. 33 U.S.C.A. s. 1342(o). The Department's emission standards for power plants do not contain a similar provision, but instead do contain emissions limits set by regulations that must be met, until the regulations are amended to establish some new limit. An evaluation based on the shutdown condition – presumably zero emissions - or some hypothetical emissions from repowering would seem arbitrary in contrast to using the regulatory emission limits or the actual current emissions of carbon dioxide.

The Petitioners argue that the Department has violated past precedent, and therefore has acted in an arbitrary and capricious manner. The Department denied a request for an amendment for another power plant, Salem Harbor, but that facility was not in compliance with the emission standards at 310 CMR 7.29. See Letter from the Department to Mr. Michael A. Fitzgerald, USGen New England, Inc. dated February 6, 2003. Somerset Station is in compliance with the emissions standards established in the regulations and its original Emission Control Plan, and the basis for its proposed amendment for the implementation of plasma gasification technology presents a quite

different circumstance justifying a different outcome. The Department may set standards through adjudication, but appropriately distinguishes between differing cases. See Town of Brookline v. DEQE, 387 Mass. 372 (1982); Boston Gas Co. v. Dep't of Public Utilities, 367 Mass. 92 (1975).

Petitioners argue that the approval of the Amended Plan, without the shutdown or repower condition, violates the Department's legal mandate "to minimize and prevent damage or threat of damage to the environment." M.G.L. c. 21A, s. 8. First, this section expressly states that its mandate does not "limit or restrict any existing authority" of the Department. Id. Second, the Department is charged by the legislature to make determinations based upon its expertise, and there is no evidence here that the Department failed to give due consideration to its decision. See Town of Brookline v. DEQE, 398 Mass. 404 (1986). Finally, as Somerset and the Department note, plasma gasification technology was not envisioned at the time of the original Emission Control Plan. The Department must be able to evaluate and approve new technologies, and cannot be locked forever into conditions or approaches to environmental protection as applied to energy production. It also appears that emissions of nitrous oxides, sulfur dioxide and mercury will be greatly reduced by this technology. Carbon dioxide emissions will be subject to the additional "cap-and-trade" program.

CLF has already sought review by the Executive Office of Energy and Environmental Affairs ("EOEEA"). CLF filed a Request for an Advisory Opinion (October 4, 2007) and a Petition for Fail-Safe Review (November 16, 2007). See 301 CMR 11.01(6); 301 CMR 11.04. The Secretary of EOEEA, Ian Bowles, concluded that the carbon dioxide emissions from the plant would not cause additional damage to the

environment if they remained at current levels. The Secretary requested the Department to include a condition capping Somerset Station's carbon dioxide levels at 860,708 tons per year, its current level. The Department included this cap in its approval of the Amended Emission Control Plan and Non-Major Comprehensive Plan Application. The Secretary also specifically stated that the carbon dioxide released from the firing of biomass should not be counted toward the cap. See Letter Re: Request for Advisory Opinion and Fail-Safe Petition Regarding the Proposed Conditional Approval of Somerset Power's Non-Major Comprehensive Plan Application and Emission Control Plan Draft approval, from Secretary Ian Bowles to Shanna Vale (January 4, 2008). Thus, the Department's approvals include limitations on carbon dioxide emissions that are significantly more stringent than the 916,586 tons that would be allowed under the standards set by 310 CMR 7.29.

The Petitioner's arguments against a "double credit" based on the Department's treatment of biomass firing that would occur as part of the new technology are similarly to no avail. The plasma gasification technology approved under the Amended Emission Control Plan incorporates biomass as well as coal. The Division of Energy Resources has the legislative mission to establish a renewable energy portfolio standard for retail energy suppliers selling electricity to end-use consumers in the state. M.G.L. c. 25A, s. 11F. The Division promulgated the Renewable Energy Portfolio standards at 225 CMR 14.00 that may allow Somerset to earn credit for generating electricity using eligible biomass that can be made available to retail electricity suppliers. The so-called "double credit" for carbon dioxide emissions from firing of biomass is a function of the interplay between the two sets of regulations. Allowing this interplay is a policy choice consistent

with the legislative mandates that cannot be the subject of an actionable claim for an adjudicatory hearing. Goldberg v. Bd. of Health, 444 Mass. 627 (2005).

The emissions standards for power plants originally were promulgated to address emissions of nitrogen oxides, sulfur dioxide, mercury, carbon monoxide, fine particulate matter and carbon dioxide. 310 CMR 7.29. These regulations governed only six power plants in the Commonwealth, and required facility-specific standards and plans. The regulations have been amended, as of January 25, 2008, to state that the carbon dioxide emissions standards in 310 CMR 7.29(5)(a)5.a. do not apply to emissions after December 31, 2008. 310 CMR 7.29(1). Beginning on January 1, 2009, the Department will replace the carbon dioxide standards specified in 310 CMR 7.29 with the "cap-and-trade" program called the Massachusetts Carbon Dioxide Budget Trading Program. The program is implemented as part of the Regional Greenhouse Gas Initiative, a regional "cap-and-trade" program aimed at reducing emissions from fossil fuel electrical generating facilities. A "cap-and-trade" program is a market-based approach to emissions reductions at the lowest cost. 310 CMR 7.70; See Background Information and Technical Support for Proposed Adoption of 310 CMR 7.70 and Amendments to 310 CMR 7.29 and 310 CMR 7.00:Appendix B(7) (July 2007). Facilities must submit applications for emission control plans for carbon dioxide under the new regulations by August 1, 2008. 310 CMR 7.70.

The "shutdown or repower" condition of the original Emission Control Plan that the Petitioners urge should remain would take effect in 2010. The "cap-and-trade" program will be initiated January 1, 2009, based upon the August 1, 2008 applications. I conclude that the Amended Emission Control Plan, reviewed concurrently with the

development of regulations for the "cap-and-trade" program, reflects the Commonwealth's new policy objectives and mechanisms for the control of carbon dioxide emissions. An evidentiary hearing would be to no avail here because the policy choice as to the state's approach to global warming has been carefully developed, as a regional initiative with other states, and adopted by regulation. See Matter of Town of Hamilton, Topsfield, and Wenham, Docket Nos. 2003-065, 2003-079 and 2003-068, Recommended Final Decision (January 19, 2006) (role of hearing officer is not to independently evaluate and substitute alternatives where Department's discretionary determination is within its authority and reasonable), adopted by Final Decision (March 27, 2006).

Standing

The Petitioners' notice of claim may be dismissed for lack of standing without reaching the merits for several reasons. CLF asserts that it is substantially and specifically affected by the Department's action. In the alternative, the twelve citizens assert a right to intervene pursuant to M.G.L. c. 30A, s. 10A. Although CLF unquestionably has a long-standing involvement in the issues surrounding coal-fired power plants, this commitment does not mean that it has standing to initiate an adjudicatory hearing. I also conclude that CLF and the twelve citizen group did not have the right to initiate, as opposed to intervene in, an adjudicatory hearing pursuant to M.G.L. c. 30A, s. 10A.

The Department's air pollution control regulations do not contain an explicit provision governing appeals. In the absence of specific appeal language, the Department considers the standing of a person to request a hearing and the procedures for filing such

a request as governed by the provisions of M.G.L. c. 30A and 310 CMR 1.01. The Amended Emission Control Plan stated that an aggrieved person could appeal.

The Petitioners claim that they have standing as intervenors. For purposes of intervention, a petitioner must be "substantially and specifically affected," suffering a concrete injury different in kind or magnitude than that suffered by the general public and with an interest within the zone of interests protected by the statute or regulations governing the hearing. 310 CMR 1.01(7)(d). CLF asserts that its members will be harmed, but the members are no different from the general public within the vicinity of Somerset Station. CLF is not affected as an environmental advocacy organization, because the group suffers no cognizable injury. See Matter of City of Marlborough, Easterly Wastewater Treatment Facility, Docket No. 05-193, 05-194, 05-195, 05-196, Ruling on Motion to Intervene (February 3, 2006). Similarly, the twelve residents have not shown that they are affected in any way that is different than the general public. Petitioners cite to Massachusetts v. EPA, the recent Supreme Court case where Massachusetts was found to have standing to challenge EPA, to show that the effects of global warming may provide grounds for standing. Massachusetts v. EPA, 549 U.S. __, 127 S. Ct. 1438 (2007). This case cannot be cited, however, for the proposition that individual citizens all have standing based upon harm from global warming; the Supreme Court found that Massachusetts as a state had standing to represent its residents in court. Id.

CLF and the twelve citizen group also claim that M.G.L. c. 30A, s. 10A independently confers standing to request a hearing. M.G.L. c. 30A, s. 10A provides that

any group of no less than ten citizens may "intervene" in "any adjudicatory proceeding"[3] in which "damage to the environment"[4] is or may be at issue:

> Notwithstanding the provisions of section ten, not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue. In any such proceeding pursuant to chapter 91, at least 5 of the 10 persons shall reside in the municipality in which the license or permitted activity is located. The intervention shall clearly and specifically state the facts and grounds for intervening and the relief sought, and each intervening person shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative. Notwithstanding any other provision of this chapter, any intervener under this section may introduce evidence, present witnesses and make written or oral argument, except that the agency may exclude repetitive or irrelevant material. Any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter, including specifically the right of appeal.

M.G.L. c. 30A, s. 10A.[5] The statute quite clearly allows ten citizen groups to "intervene" to address perceived damage to the environment.[6] Conspicuously absent

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[3] As defined in M.G.L. c. 30A, s. 1: "Adjudicatory proceeding" means "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing."

[4] As defined in M.G.L. c. 214, s. 7A, "damage to the environment" "shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources." There appears to be no question that carbon dioxide emissions resulting in climate change cause "damage to the environment."

[5] The section was amended in 2006 as to the residency for M.G.L. c. 91 and to require affidavits from intervenors.

[6] "Intervention" in ordinary usage means entering into a lawsuit as a third party to protect an alleged interest. See American Heritage Dictionary, Second College Edition(1985). As a legal term, intervention means "the procedure by which a third person, not originally a party to the suit, but claiming an interest in

from this section is the opportunity to request an adjudicatory hearing as opposed to a right to intervene.

In fact, the Petitioners have submitted nothing to support a claim that as a ten citizen group they "intervened" in the permit proceeding. Even assuming that the statute and regulations would allow a ten citizen group to "intervene" during the permit proceeding and thereby acquire rights to appeal the permit after issuance, the Petitioners did not properly "intervene." The Petitioners have not asserted that they filed a petition to intervene or even submitted as a group comments during the public comment period on the permit. Although CLF did participate in the prior proceeding by appearing at the public hearing and submitting written comments during the public comment period, it is only one "person" for purposes of membership in the group.

The twelve citizens apparently attended a "Citizen's Hearing" organized by the Massachusetts Clean Air Coalition on February 11, 2008, but this event was not part of the adjudicatory proceeding before the Department and, in fact, occurred only after the Amended Plan was approved. There is no evidence to suggest, nor has CLF asserted, that it acted on behalf of the twelve citizens prior to filing this appeal. The citizens provision in M.G.L. c. 30A, 10A requires timely intervention as a group. I conclude, therefore, that the Petitioners did not "intervene" as defined in M.G.L. c. 30A, s. 10A.

In Matter of Riverside Steam and Electric Co., Docket No. 88-132 (July 15, 1988), the Department allowed a ten citizen group to request a hearing based upon M.G.L. c. 30A, s. 10A over the objection of the applicant on the theory that the group had acquired the right to request a hearing by its prior intervention in the permit proceeding.

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the subject matter, comes into the case, in order to protect his right or interpose his claim." Black's Law Dictionary, 6th Ed., 1990.)

The citizens' group had formally petitioned to intervene prior to issuance of the permit. The Department responded by notifying the citizen group of appeal procedures. Matter of Riverside Steam and Electric Co., Docket No. 88-132 (July 15, 1988). The Administrative Law Judge then acted on the intervention request, finding that the group had intervened within the meaning of M.G.L. c. 30A, s. 10A during the permit proceeding and could therefore request and adjudicatory hearing.[7] The Petitioners here did not properly intervene, and their reliance on Riverside is therefore misplaced.[8] Past Department practice has allowed ten citizen groups to intervene but not to initiate an adjudicatory hearing, consistent with the language of M.G.L. c. 30A, s. 10A.[9]

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[7]Similarly, certain Department regulations require ten citizen groups to take steps such as the submission of comments during the public comment period as a prerequisite to the filing of an appeal; the public notice clearly states that failure to submit comments will result in the waiver of any right to a hearing. See 310 CMR 9.17(1)(c) (allowing appeals of waterways licenses by "ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, s. 10A, who have submitted written comments within the public comment period."); 310 CMR 9.13(1)(c)7. (notice of waiver of right). No such provision appears in the air pollution regulations.

[8] Other cases to which the Petitioners cite related to the intervention provision of M.G.L. c. 30A, s. 10A were resolved through a settlement agreement and routine dismissal by presiding officers, so that the Department's Commissioner did not have the opportunity to review the prior rulings. The appeal in Northland was withdrawn and dismissed as moot. Matter of Northland Residential Corporation, Docket No. 2003-138 and 2003-146, Final Decision-Order of Dismissal (June 28, 2004). Matter of Rocky Mountain Spring Water Company, Docket No. 2000-106, Ruling on Motion to Dismiss (June 5, 2001), where a ten citizen group was allowed to appeal a Water Management Act permit, was concluded by a Final Decision by the Commissioner on August 6, 2002 which adopted a Recommended Decision (September 18, 2002), but these decisions only reviewed a proposed settlement and did not address the standing issue.

[9] Two Clean Water Act cases, Matter of Town of Plymouth, Docket No. 00-091, Ruling on Department's Motion to Clarify Standing and to Dismiss for Lack of Standing (August 9, 2001) and Matter of Town of Newburyport, Docket No. 2002-218, Ruling on Motions and Legal Issues (October 10, 2003), do not reach the question of standing of the ten citizen group because another petitioner was found to have standing. Matter of Town of Hanson, Docket No. 2000-081, Ruling on Motion to Dismiss for Lack of Standing (January 31, 2001) was based on the applicable but quite different regulatory provisions of the Water Management Act. See 310 CMR 36.40. Matter of Duffy Brothers Management Co., Docket No. 98-088, Final Decision (August 9, 1999) dismissed for lack of standing a ten citizen group that had not intervened in the preceding wetlands permitting process. Matter of Labrie Stone Products, Inc., Docket No. 93-066, Final Decision (February 11, 1994) concluded that a ten citizen group lacked standing to appeal a wetlands permit. Matter of Nantucket Marine Dept., Docket No. 96-023, Decision and Order re Standing (August 20, 1996), Final Decision (October 16, 1997), concluded that a ten citizen group lacked standing to initiate an administrative hearing in contrast to a ten residents group from the municipality specifically given standing under the regulations at 310 CMR 10.05(7). Most recently, in Matter of McLean, the Final Decision

CLF also argues that the last clause of M.G.L. c. 30A, 10A, "specifically the right of appeal," refers to a request for an adjudicatory hearing. Generally, M.G.L. c. 30A uses the phrase "request a hearing" rather than "appeal" to refer to the initiation of an administrative or adjudicatory hearing. See M.G.L. c. 30A, s. 10. The "right of appeal" appears instead to refer to an appeal to court, so that a citizens group that had properly intervened could seek redress without necessarily being aggrieved as would otherwise be required under M.G.L. c. 30A, s. 14.

The Department's rules for adjudicatory proceedings meet the statutory requirement of M.G.L. c. 30A, s. 10A by specifically allowing intervention in a hearing to protect the environment:

> Pursuant to M.G.L. c. 30A, s. 10A, any group of ten or more persons may intervene collectively as a party in any adjudicatory proceeding in which damage to the environment as defined in M.G.L. c. 214, s. 2A [sic] is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such adjudicatory proceeding shall include the disposition of such issue. Such motion to intervene shall be filed prior to the prehearing conference, absent good cause shown for a later filing. An intervener under M.G.L. c. 30A, s. 10A shall file an affidavit stating his or her intent to intervene in the proceeding, limited to the issue of damage to the environment and the elimination or reduction thereof. Interveners under M.G.L. c. 30A, s. 10A shall specifically describe the damage to the environment as defined in M.G.L. c. 214, s. 7A and the elimination or reduction sought. Such intervention shall be by motion filed in accordance with 310 CMR 1.01(11)(a).

310 CMR 1.01(7)(f). This provision applies regardless of whether there is any provision governing the standing of ten citizen groups in the various program regulations. CLF and the twelve citizen group could intervene under this provision, but only if there was a hearing in which to intervene because a party with a right to appeal had actually filed an appeal. The provision clearly does not articulate a right to initiate an adjudicatory

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specifically did not adopt a section on standing in a Recommended Decision. Matter of McLean Hospital Corporation, Docket No. 2006-055, Final Decision (April 15, 2008).

hearing. Honoring the distinctions between rights to appeal and rights to intervene is essential, so that the Department's administrative hearings conform to the law and regulations.

Extension of the January 1, 2010 Date for Conversion

Somerset filed a motion requesting an extension of the deadline of January 1, 2010 for converting from pulverized coal to syngas, as required by the Second Non-Major Comprehensive Plan Application and Amended Emission Control Plan. Specifically, it seeks a day-for-day extension beginning on February 15, 2008, the filing of the Petitioners' notice of claim, until all administrative and court appeals are resolved. Somerset states that Petitioners' challenges have rendered a conversion by the deadline impossible and cites Belfer v. Bldg. Comm'r of Boston for the principle that tolling is appropriate where an appeal creates a practical impediment to the use of a benefit. Belfer v. Bldg. Comm'r of Boston, 363 Mass. 439 (1973). The Petitioners argue that Somerset should have taken project delays into account in its planning, and that I lack the authority to extend permit deadlines and doing so would usurp the public process undertaken during permitting. The Department asserts that I have authority to extend the deadline and does not oppose the motion for an extension to reflect the administrative process only. See 310 CMR 1.01(5)(a).

The Petitioners are correct that the air regulations contain procedures that include public participation for amendments or modification to approvals. 310 CMR 7.29(6)(h). In fact, Somerset submitted its proposal for converting to syngas under this provision, resulting in Petitioners' challenge of the Department's approval of the amendment. A notice of claim related to a Department permit may lead to a Final Decision that sustains

or vacates a permit, but adjudication often results in changes to a permit, license, or other action that become final without undergoing additional permit procedures. See, e.g., Matter of Town of Hamilton, Topsfield, and Wenham, Docket Nos. 2003-065, 2003-079 and 2003-068, Recommended Final Decision (January 19, 2006) (administrative hearing is de novo), adopted by Final Decision (March 27, 2006). Customarily, Department approvals are issued with a date contemporaneous with the Final Decision concluding the adjudication. For example, when a notice of claim is filed on a superseding order of conditions for work in wetlands pursuant to M.G.L. c. 131, s. 40, the Final Order of Conditions will receive a new date consistent with the Final Decision that reflects the conclusion of the adjudication. Permits, licenses or other approvals are not issued with extensions to allow for court appeals because an appeal to court does not stay a Department action. M.G.L. c. 30A, s. 14(3).

Therefore, an extension of the deadline is appropriate for the time of the administrative proceedings after the filing of the Petitioners' notice of claim, but not for the time involved with any appeals to court. The time from the filing of the notice of claim on February 15, 2008 to the Final Decision will be approximately five months, allowing thirty days for the issuance of a Final Decision from the date of this Recommended Final Decision. Accordingly, I recommend that the approvals reflect a revision in the deadline from January 1, 2010 to the date of the Final Decision for Unit 6/Boiler 8 to cease burning pulverized coal and be shutdown for conversion to syngas.

Conclusion

I grant the joint motion to dismiss for failure to state a claim upon which relief may be granted, filed by Somerset and the Department, because the Department was not

required to retain the original "shutdown or repower" condition and may approve the conversion to syngas. I also conclude that the Petitioners do not have standing to bring this appeal, because they are not substantially and specifically affected and may not request a hearing pursuant to the intervention provision in M.G.L. c. 30A, s. 10A. The Department's approvals should be modified to reflect the date of the Final Decision for the conversion to syngas.

Pamela D. Harvey
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.